



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/798,008	03/10/2004	Joseph P. Markham	7032-85-CIP	4940

22442 7590 02/08/2006

SHERIDAN ROSS PC
1560 BROADWAY
SUITE 1200
DENVER, CO 80202

EXAMINER

SAYALA, CHHAYA D

ART UNIT	PAPER NUMBER
----------	--------------

1761

DATE MAILED: 02/08/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/798,008	MARKHAM ET AL.	
	Examiner	Art Unit	
	C. SAYALA	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-37 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) ____ is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>3/26, 10/8/04, 1/7/05</u> . | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

1. Claims 1-37 are rejected under 35 U.S.C. 103(a) as being unpatentable over of Wenger (US Patent 5939124) and Hauck et al. (US Patent 6609819) in view Martin et al. (US Patents 5820039 and 5713526) and Griffith et al. (US Patent 4017034) and further in view of Miller et al. (US Patent 3899607), Fritz-Jung et al. (US Patent 6270820), and Spanier (US Patent 4997671) with Wang (US Patent 6455083) and Weyn (US Patent 4039687).

Wenger teach extruding starch-bearing grains such as milo (see col. 7, lines 1-3), with the addition of fish-meal. Note col. 3, lines 15-30 and col. 9, lines 30-65 and col. 17, lines 5-10 that teach the variation of moisture content for the density required. See col. 9, lines 60-65 that teach equilibrating moisture levels after extrusion by cooling/drying, i.e. curing, and that the final product has a moisture content of up to 20 wt% or preferably up to about 18 wt%. Similarly, Hauck et al. teach extruding sorghum (col. 6, line 5) with a Wenger extruder under different operating conditions and amounts of ingredients so that both dense pellets such as for aquatic feed and less dense pellets such as for bird feed can be manufactured (see col. 6 and col. 7). The patents do not show decorticating, cleaning, destoning and scouring milo.

Art Unit: 1761

Martin et al. teach decorticating, cleaning, destoning and scouring milo berries.

See Fig 1. Col. 1 states that such processes remove the bitter tannins from milo berries. The berries are then ready for use in food products (see col. 2, lines 25+). Griffith et al. also teach decorticating and degerminating sorghum before milling.

It would have been obvious to use the Martin et al./Griffith et al. processes to precede the extrusion shown by Wenger and Hauck et al. for the reasons shown by Martin et al., which is to improve taste. Further, cleaning and other preparation steps preceding food manufacture using sorghum grain, appear to be known in the art at the time the invention was made and would have been obvious to one of ordinary skill in the art.

The above patents do not teach grinding the extruded product and re-extruding the product to be molded, baked or pelletized. Fritz-Jung et al. teach such steps. See col. 3, lines 45+, where the extruded product is ground and re-extruded and cut into kibbles. Miller et al. also teach grinding the extruded food product and then re-extruding the resultant product into a molded product. See col. 5, lines 1-20. Such steps therefore, were old and known in the art when food products with proteinaceous and farinaceous ingredients were used and extruded. Spanier teaches using milo as the grain ingredient and extruding the dough by means of extrusion molding. See col. 6, line 47, col. 8, line 62 to col. 9, line 6, col. 10, line 48 to col. 11, line 13 and col. 12, lines 35-47. Example 1 teaches that the extruded dough when molded is baked in an oven at 185-200°F. Wang also teaches a sorghum containing food product that may be

Art Unit: 1761

extrusion molded into various shapes. Weyn teaches extruding milo-containing food into pellets.

To incorporate steps that include grinding and re-extruding by extrusion molding and baking the molded product or cutting the re-extruded product into kibbles or extruding into pellets would have been obvious to one of ordinary skill in the art at the time the invention was made, since prior art as applied above teach that these were known in the art and were practiced to obtain the desired shape. Wenger and Hauck teach extrusion too with use of milo as an ingredient and, extrusion into molds, as pellets or baking an extruded product were all embodiments known in the food art, as established by these references and all when sorghum/milo was one of the ingredients.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1-37 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-15 of

Art Unit: 1761

copending Application No. 10/431490 in view of Miller et al. (US Patent 3899607), Fritz-Jung et al. (US Patent 6270820) and Spanier (US Patent 4997671) with Wang (US Patent 6455083) and Weyn (US Patent 4039687).

The above patent application '490, does not teach grinding the extruded product and re-extruding the product to be molded, baked or pelletized. Fritz-Jung et al. teach such steps. See col. 3, lines 45+, where the extruded product is ground and re-extruded and cut into kibbles. Miller et al. also teach grinding the extruded food product and then re-extruding the resultant product into a molded product. See col. 5, lines 1-20. Such steps therefore, were old and known in the art when food products with proteinaceous and farinaceous ingredients were used and extruded. Spanier teaches using milo as the grain ingredient and extruding the dough by means of extrusion molding. See col. 6, line 47, col. 8, line 62 to col. 9, line 6, col. 10, line 48 to col. 11, line 13 and col. 12, lines 35-47. Example 1 teaches that the extruded dough when molded is baked in an oven at 185-200⁰F. Wang also teaches a sorghum containing food product that may be extrusion molded into various shapes. Weyn teaches extruding milo-containing food into pellets.

To incorporate steps that include grinding and re-extruding by extrusion molding and baking the molded product or cutting the re-extruded product into kibbles or extruding into pellets would have been obvious to one of ordinary skill in the art at the time the invention was made. Extrusion into molds, as pellets and baking an extruded product were all embodiments known in the food art as established by these references and all when sorghum/milo was one of the ingredients.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

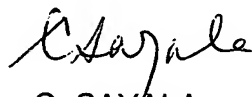
Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to C. SAYALA whose telephone number is 571-272-1405.

The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



C. SAYALA
Primary Examiner
Group 1700.